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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MAKO FUND, INC,

Plaintiff and Appellant,

v.

KATHLEEN PERRONE,

Defendant and Respondent.

B238048

(Los Angeles County
Super. Ct. No. EC055167)

APPEAL from an order of the Superior Court of Los Angeles County.

Donna Fields Goldstein, Judge. Affirmed.

Law Office of Gary Kurtz, Gary Kurtz; and Jeffrey A. Cohen for Plaintiff
and Appellant.

Paul Runes for Defendant and Respondent.

In underlying litigation, Mako Fund, Inc. (Mako) and San Remo Funding Group (San Remo), a general partnership, sued each other for breach of contract and breach of fiduciary duty. Mako prevailed, obtaining a judgment on its complaint for compensatory damages, punitive damages, costs of suit, and attorney fees. When Mako discovered San Remo lacked sufficient assets to satisfy the judgment, it moved in the trial court for leave to amend the judgment to add one of San Remo's general partners, Neva McDannald, as a judgment debtor on the ground that San Remo was McDannald's alter ego. The trial court denied the motion on the ground that Mako failed to demonstrate McDannald was in fact a partner of San Remo and, if she was, failed to establish whether she became a partner before or after San Remo incurred any obligation to Mako.

When it learned McDannald had died, Mako filed a creditor's claim against her estate, which the administrator of the estate denied. Mako then commenced the instant action against the administrator, alleging the underlying judgment against San Remo should be amended on an alter ego theory to add McDannald as a judgment debtor. The trial court sustained the administrator's demurrer without leave to amend, dismissed the action, and awarded the administrator attorney fees.

Mako appeals from the order of dismissal. On appeal, Mako abandons its alter ego theory and its claim for compensatory and punitive damages, and now seeks reversal only as to costs and fees awarded in the underlying litigation, on the theory that a partner is liable for partnership debts. Mako also contends the trial court improperly awarded attorney fees to the administrator of McDannald's estate.

We affirm.

BACKGROUND

Because neither side provides a statement of the underlying facts, which in any event are largely irrelevant, we will give them cursory and tentative treatment, gleaned from such documents in the record as are undisputed.

San Remo, a general partnership, participated with Mako in a joint venture involving the operation of a truck parking facility in Los Angeles. Paragraph 20.9 of their joint venture agreement provided: “Attorneys’ Fees. If any legal action, arbitration, or other proceeding is brought to enforce this Agreement, or because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, the successful or prevailing party or parties shall be entitled to recover all attorneys’ fees and other costs incurred in that action, arbitration, or proceeding (or any appeal thereof) in addition to any other relief to which it or they may be entitled.”

When a dispute arose over operations, Mako sued San Remo and Francis Campagna, a general partner, for breach of fiduciary duty. San Remo cross-complained for breach of contract and other causes of action. On August 25, 2006, the trial court entered judgment “[o]n the complaint of Mako Fund, Inc. and against San Remo Funding Group” for \$849,700 in compensatory damages, \$20,000 in punitive damages, \$7,358.69 for costs of suit, and \$312,897 in attorney’s fees.”

When it discovered San Remo lacked sufficient funds to satisfy the judgment, Mako filed a motion in the superior court to amend the judgment to add McDannald, another San Remo partner, as a judgment debtor. The trial court ultimately denied the motion, explaining at the hearing that the Corporations Code “provides a general partner is not personally liable for the obligations incurred before joining the partnership. There is no showing when McDannald became a partner or McDannald is in fact a partner.” Mako did not appeal this ruling, and it has become final.

Prior to the hearing on its motion to amend the judgment, Mako learned McDannald had died and probate had been opened on her estate’s behalf. It filed a creditor’s claim in probate court for the amount of its judgment against San Remo. Kathleen Perrone, the administrator of McDannald’s estate, rejected the claim. Mako then filed a civil lawsuit against Perrone for satisfaction of the San Remo

judgment from McDannald's estate. It also sought an order amending the underlying judgment to include McDannald's estate as a judgment debtor. Perrone demurred on the ground that "[a] judgment against a partnership is not by itself a judgment against a partner" and "may not be satisfied from a partner's assets unless there is also a judgment against the partner." (Corp. Code, § 16307, subd. (c).)

On August 12, 2011, the trial court sustained Perrone's demurrer without leave to amend.

Perrone then filed a motion for attorney fees, which the trial court granted, awarding her \$18,975.00. On October 19, 2011, the trial court filed a revised order in which it dismissed Mako's complaint with prejudice and ordered it to pay Perrone the sum of \$19,540 for costs of suit, including \$18,975 in attorney fees.

Mako appealed from the resulting judgment, stating "This appeal will necessarily challenge the trial court's order sustaining [sic] demurrer without leave to amend, entered on August 12, 2011." The notice of appeal makes no mention of the attorney fee award.

On March 5, 2012, Perrone filed a petition for a final accounting of McDannald's estate, setting forth the distribution of estate assets without regard for Mako's rejected creditor's claim. Mako filed no objection to the final accounting. On May 30, 2012, five months after Mako filed its notice of appeal, the probate court approved the accounting.¹

DISCUSSION

A. Demurrer

On appeal, Mako expressly abandons its alter ego theory and its attempt to hold McDannald's estate liable for compensatory and punitive damages awarded against San Remo in the underlying litigation. It now contends only that

¹ Perrone's requests for judicial notice are granted.

McDannald's estate is liable for costs and attorney fees awarded in the underlying litigation because a partner is liable for the partnership's obligations. We disagree.

Under subdivision (a) of Corporations Code section 16306, a partner is generally liable for the partnership's obligations. But pursuant to subdivision (c) of Corporations Code section 16307, "A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Mako concedes it did not name McDannald as a defendant in the underlying litigation against San Remo and has never secured a judgment against her. Her estate is therefore not obligated to satisfy any part of Mako's judgment against San Remo.

Mako argues the rule immunizing a partner from liability under a judgment against the partnership should not apply when the judgment results from litigation initiated *by* the partnership. It argues that the costs and fees awarded in the underlying action were for its successful defense against San Remo's complaint, and it would be unfair to permit McDannald's estate to escape the consequences of litigation initiated on her behalf and from which she stood to benefit. Mako cites no authority supporting the argument and we have discovered none.

At any rate, we need not decide whether subdivision (c) of section 16307 applies when a partnership's obligation results from litigation initiated by the partnership itself, because the record demonstrates, contrary to Mako's representation, that the underlying judgment was on litigation initiated by Mako, not San Remo. Mako sued San Remo for breach of fiduciary duty, after which San Remo cross-complained for breach of contract and other causes of action. The trial court awarded damages, costs and attorney fees "[o]n the complaint of Mako Fund, Inc. and against San Remo Funding Group." Mako's argument therefore fails not only for lack of authority but also for lack of a factual predicate.

B. Perrone's Award of Costs and Fees

Mako argues Perrone was not entitled to attorney fees incurred to defend against its creditor's claim. We disagree.

Preliminarily, Perrone argues that Mako's failure to reference the attorney fee award in its notice of appeal deprives this court of jurisdiction to review the order granting fees. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46.) We disagree. We are required to construe the notice of appeal liberally. (Cal. Rules of Court, rule 8.100(a)(2).) In its notice, Mako states the appeal is taken from the "Order of Dismissal, entered on October 19, 2011." That order set forth not only the dismissal, but also the attorney fee award. We therefore construe the notice as applying to the award.

Perrone claimed attorney fees under the fees provision of the joint venture agreement between Mako and San Remo. That provision stated: "If any legal action, arbitration, or other proceeding is brought to enforce this Agreement, or because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, the successful or prevailing party or parties shall be entitled to recover all attorneys' fees and other costs incurred in that action, arbitration, or proceeding (or any appeal thereof) in addition to any other relief to which it or they may be entitled." Mako's lawsuit against Perrone was a "legal action" brought "because of an alleged dispute . . . in connection with" the joint venture agreement. Perrone prevailed. (Code of Civil Procedure, § 1032, subd. (a)(4) ["[p]revailing party" includes . . . a defendant in whose favor a dismissal is entered"].) Pursuant to the joint venture agreement, she was entitled to attorney fees. Any request for appellate attorney fees should be presented in the first instance to the trial court on remand. (See Cal. Rules of Court, rule 3.1702(a), (c).)

DISPOSITION

The orders dismissing Mako's complaint and awarding Perrone costs and attorney fees are affirmed. Respondent is to recover her costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.